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No. 84-194

In The

Supreme Court of the United States

October Term, 1984

UNITED STATES OF AMERICA,

Petitioner,

v.

LOUISE SHEARER, INDIVIDUALLY AND AS ADMINISTRATRIX FOR THE ESTATE OF VERNON SHEARER, DECEASED,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

WILLIAM T. CANNON, ESQUIRE
Suite 1500 Robinson Building
42 South Fifteenth Street
Philadelphia, Pennsylvania 19102
(215) 564-4449

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

QUESTIONS PRESENTED

1. Whether the survivor of a serviceman who was murdered by a fellow serviceman, while both were off duty and off the military reservation in another state off base, may sue the government for damages under the Federal Tort Claims Act, notwithstanding the intentional tort exception, where military personnel are on notice concerning the offending serviceman's dangerous propensities and were negligent in failing to remove him from the military, supervise his activities, or warn persons in the positon of plaintiff's decedent of his propensities.

2. Whether such a suit, alleging that negligence on the part of the serviceman's superior officers and Department of the Army civilians caused the death of plaintiff's decedent, is precluded by the doctrine of *Feres v. United States,* 340 U.S. 135 (1950), which bars suits by servicemen for torts incident to military service.

TABLE OF CONTENTS

	Page
Questions Presented	i
Opinions Below	2
Jurisdiction	2
Statutes Involved	2
Statement	3
Statement in Opposition to Petition	7
Conclusion	14

TABLE OF AUTHORITIES

CASES:

Feres v. United States, 340 U.S. 135 (1950) 5, 6, 12, 13

Gibson v. United States, 457 F.2d 1391 (3rd Cir. 1972) 7

Harten v. Coons, 502 F.2d 1363 (10th Cir. 1974), Cert. denied, 420 U.S. 977 (1975) 13, 14

Hatzlachh Supply Co. v. United States, 444 U.S. 460 (1980) 6

Hicks v. United States, 511 F.2d 407 (D.C. Cir. 1975) 8, 12

Hughes v. Sullivan, 514 F.Supp. 667 (E.D. Va. 1980) 9

Hughes v. United States, 662 F.2d 219 (4th Cir. 1981) 9

Jaffe v. United States, 663 F.2d 1226 (3rd Cir. 1981) 12, 13

Liuzzo v. United States, 508 F.Supp. 1030 (D.C. Mich. 1981) 11

TABLE OF AUTHORITIES—Continued

	Page
Naisbitt v. United States, 611 F.2d 1350, cert. denied, 449 U.S. 885 (1980)	9
Panella v. United States, 316 F.2d 622 (2d Cir. 1954)	11
Parker v. United States, 611 F.2d 1007 (5th Cir. 1980)	13, 14
Rodgers v. United States, 397 F.2d 12 (4th Cir. 1968)	8
Stencel Aero Engineering Corp. v. United States, 431 U.S. 666 (1977)	6, 12
Underwood v. United States, 356 F.2d 92 (5th Cir. 1966)	8, 12
United States v. Brown, 348 U.S. 110 (1954)	12, 13
United States v. Shively, 345 F.2d 294 (5th Cir. 1965)	9
White v. United States, 317 F.2d 13 (4th Cir. 1963)	14
Woodside v. United States, 606 F.2d 134 (6th Cir. 1979), cert. denied, 445 U.S. 904 (1980)	13

STATUTES:

Federal Tort Claims Act:

28 U.S.C. 1346(b)	2, 4
28 U.S.C. 2671 et seq.	3
28 U.S.C. 2680	3, 4, 6
28 U.S.C. 2680(h)	5, 7, 8, 10, 11

MISCELLANEOUS:

Restatement (Second) of Torts (1965)	11

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

William T. Cannon, Esquire, on behalf of Louise Shearer, Individually and as Administratrix for the Estate of Vernon Shearer, Deceased, Respondent, answers to the United States Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The Opinion of the Court of Appeals (Petitioner's App. 1a-23a) is reported at 723 F.2d 1102. The statements on denial of rehearing (Petitioner's App., infra, 33a-36a) are reported at 729 F.2d 266. The Opinion of the District Court (Petitioner's App., 24a-29a) is reported at 576 F. Supp. 672.

JURISDICTION

The judgment of the court of appeals (Petitioner's 31a-32a) was entered on December 19, 1983. A petition for rehearing was denied on March 7, 1984 (Petitioner's App., 33a-36a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

28 U.S.C. 1346(b) provides in part:

> Subject to the provisions of [28 U.S.C. 2671-2680], the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages * * * for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. 2680 provides in part:

> The provisions of this chapter and section 1346 (b) of this title shall not apply to—
>
> * * *
>
> (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: Provided, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

STATEMENT

1. Respondent is the mother and administratrix of a serviceman, Private Vernon Shearer, who was stationed at Fort Bliss, Texas. While Shearer was on authorized leave and off the base, he was kidnapped and murdered by another serviceman, Heard, who was also stationed at Fort Bliss and was also off duty at the time. This crime occurred in Otero County, New Mexico, which is adjacent to Fort Bliss. (Petitioner's App., 2a-3a; C.A. App. 5a, 22a). Heard was subsequently convicted of mur-

der in a New Mexico state court and sentenced to a term of 15 to 55 years' imprisonment (C.A. App 16a).

Respondent subsequently brought this action under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 et seq., seeking damages from the United States. She claimed that the Army's negligent failure to prevent Heard from murdering Shearer was responsible for Shearer's death. Specifically, respondent alleged (C.A. App. 17a-18a; Complaint paras. 40-41):[1]

> 40. The United States Government, acting through its Department of the Army, * * * negligently and carelessly failed to exert a reasonably sufficient control over Andrew Heard, to take any action to prevent him from endangering other persons, in spite of the defendant's knowledge of his dangerous murderous propensities, and further failed to warn other persons that he was at large, and of the danger which he presented.
>
> 41. The United States Government, acting through its Department of the Army, * * * negligently and carelessly failed to then remove Andrew Heard from active military duty, in spite of its knowledge of his dangerous and murderous propensities, with a reasonable degree of promptness given the great danger potential that he posed to other active duty service members, including [Shearer], none of whom was warned of the dangers posed.

Respondent asserts that in 1977, while Heard was assigned to an Army base in Germany, he was convicted by a German court of manslaughter and sentenced to a four-year prison term. In February 1979, when German au-

[1] "Complaint" refers to the Proposed Amended Complaint (C.A. App. 11a-18a). "C.A. App." refers to the Appendix to Appellant's Brief in the Court of Appeals.

thorities granted Heard an early release from that term, the Army promptly removed him from Germany and transferred him to Fort Bliss. By the time Heard killed Shearer, in June of 1979, the Army had initiated proceedings to have Heard discharged (C.A. App. 13a-15a).

2. The United States District Court for the Eastern District of Pennsylvania granted summary judgment in favor of the government (Petitioner's App., infra 24a-30a). The district court did not address the government's contention that respondent's claim is barred by 28 U.S.C. 2680(h), the intentional tort exception to the FTCA which provides in part that the government is not liable for "[a]ny claim arising out of assault [or] battery * * *." (See Petitioner's App. 29a n.4). Instead, the court held that respondent's claim is precluded by *Feres v. United States*, 340 U.S. 135 (1950), which held that a serviceman may not sue the government under the FTCA for alleged torts incident to military service.

The district court stated that under Feres, the "question is not whether decedent was engaged in activity incident to military service when he incurred his injuries. Rather, the 'focus . . . is upon when and how the negligent act occurs'" (Petitioner's App., 26a) (citation and emphasis omitted)). The court reasoned that because respondent [allege[d]] that the Army was negligent in failing to exert "reasonable control over" Heard, respondent's claims "relate directly to decisions of military personnel made in the course of the performance of their military duty and, therefore, are barred by *Feres* (ibid.). The district court also noted that respondent is entitled to receive veterans' benefits (id. at 29a) and explained that "the existence of a no fault compensation scheme" for

servicemen, veterans, and their survivors is another reason to apply the *Feres* doctrine (Petitioner's App., infra, 28a-29a, citing *Stencel Aero Engineering Corp. v. United States,* 431 U.S. 666, 673 (1977), and *Hatzlachh Supply Co. v. United States,* 444 U.S. 460, 464-465 (1980).

3. A divided panel of the court of appeals reversed (Petitioner's App., 1a-23a). The majority overturned the district court's ruling that *Feres* bars respondent's claim explaining that "[g]enerally, an off-duty serviceman not on the military base and not engaged in military activity at the time of injury, can recover under FTCA" (Petitioner's App., 5a-6a) and that "being kidnapped off base at gun point can never be perceived as one of the activities or anticipated • • • benefits of being in the armed services" (id. at 7a (emphasis omitted)).

The Court also held that the intentional tort exception to the FTCA does not bar respondent's claim. The majority noted that respondent's complaint alleged that the government was negligent and reasoned that "if an assault and battery occurred as a 'natural result' of the government's failure to exercise due care, the assault and battery may be deemed to have its roots in negligence and therefore it is within the scope of the FTCA" (Petitioner's App., infra, 8a).

Judge Garth dissented (Petitioner App., 10a-23a). He noted his disagreement with the majority on the *Feres* issue (Petitioner's App., 11a & n.1), but principally discussed the intentional tort exception. Judge Garth noted that Section 2680(a) applies to claims "arising out of" assault or battery and not just claims "for" assault or battery (see App., infra, 13a-14a) and accordingly, by its terms, precludes respondent's claim.

The Court of Appeals denied rehearing en banc by a vote of 6-4 (Petitioner's App., 33a-36a). Judges Garth and Adams wrote dissenting statements.

Statement In Opposition To Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

The Court of Appeals holding that the Intentional Tort Exception to the Federal Tort Claims Act does not bar respondent's claim is fully in accord with the language and the manifest purposes of this provision and does not conflict with the decisions of other Federal Courts of Appeal that have considered the issue. Contrary to the government's fears, the Court of Appeals' decision does not impose a new duty on the government and the approach adopted by the Court will not result in the opening of the proverbial floodgates.

Additionally, the Court of Appeals' holding that the *Feres* doctrine does not bar respondent's claim was not error since, under the unique facts of this case, "second guessing" of the decisions of military officers will not result. Further review is therefore unwarranted.

1A. The Court of Appeals' principle holding, that the Intentional Tort Exception to the Federal Tort Claims Act, 28 U.S.C. Section 2680(h), does not bar respondent's claim is fully consistent with the decisions of other courts of appeal that have considered this issue.

In *Gibson v. United States,* 457 F.2d 1391 (3rd Cir. 1972), a corporate employee, who had been hired to train Job Corps enrollees, one of whom was a juvenile delinquent with a known addiction to narcotics, was assaulted while engaged in the performance of his duties. In plain-

tiff's complaint he alleged that the injury arose out of the basic negligence of the United States in that the attack was the foreseeable consequence of the original misconduct. The Court ruled that the matter was not controlled by the intentional tort exception of the FTCA and stated: . . . [t]he attack upon Gibson was a foreseeable consequence of the Government's failure to exercise due care under the circumstances and, therefore, it is not such an intervening act as will sever the negligence and the appellant's injuries.

In *Hicks v. United States,* 511 F.2d 407 (D.C. Cir. 1975), liability was imposed on a government hospital when it failed to inform a court of the actual condition of a patient it intended to release. The patient, after being released, shot and killed his wife, an act termed foreseeable.

In *Rodgers v. United States,* 397 F.2d 12 (4th Cir. 1968), plaintiff, a probationer, was subjected to torture by a man of unsavory reputation to whom he was exposed at night during a period in which a marshal was ordered by the Court to provide plaintiff with transportation to his home. The Court ruled that 28 U.S.C. Section 2680(h) was inapplicable: "If there is a valid claim here, it is founded on negligence even though assault and or false imprisonment may be collaterally involved."

In *Underwood v. United States,* 356 F.2d 92 (5th Cir. 1966), liability was imposed on the government for failing

to take precautions which allowed a mentally ill airman to obtain possession of a firearm which he used to kill his former wife. The government's contention that the action brought on behalf of plaintiff's decedent was barred by the intentional tort exception of the Federal Tort Claims Act was specifically rejected.

The authorities relied on by the government in support of its request for review are readily distinguishable. In *Naisbitt v. United States,* 662 F.2d 1350, cert denied, 449 U.S. 885 (1980); *Hughes v. United States,* 662 F.2d 219 (4th Cir. 1981), aff'g *Hughes v. Sullivan,* 514 F.Supp. 667 (E.D. Va. 1980); and *United States v. Shively,* 345 F.2d 294 (5th Cir. 1965), the causes of action were directly based on the commission of a deliberate assault and battery. Only through artful pleading were the litigants able to couch their causes of action in terms of negligence. Most importantly, there was a total absence of facts in these cases to suggest that the government knew or should have known either of the prior violent actions by the assailants or of the assailant's potential violence.

Respondent, herein, has alleged facts which, if proven, would permit a court to find that the government had knowledge of the violent propensities of the killer of plaintiff's decedent. The following facts are critical: Heard had been convicted and imprisoned for killing a civilian while in the Army. He was released from the prison less than four months prior to killing Shearer. Several months before Shearer was murdered, high ranking military officers, aware of Heard's violent disposition, recommended his discharge. Nevertheless, Heard remained in the Army and was treated as a member in good standing. Despite Heard's previous murder and the

Army's knowledge of his disposition, enlisted men, including Shearer, were not warned about his violent past or present disposition.

1B. The Court of Appeals' decision is not inconsistent with the language and the purposes of the intentional tort exception. While section 2680(h) bars "[a]ny claim arising out of assault [or] battery," this phrase has been interpreted not to bar a cause of action which is based on specific facts which, if proven, demonstrate that the government should have reasonably anticipated that one of their employees would commit an intentional tort. As Mr. Justice Higginbotham stated in his majority Opinion in this matter, "[f] or example, if an assault and battery occurred as a 'natural result' of the government's failure to exercise due care, the assault and battery may be deemed to have its roots in negligence and therefore it is within the scope of the FTCA." (Petitioner's App., 8a).

Furthermore, imposing liability on the government in this matter does not run afoul of congressional intent in enacting the FTCA. The government contends that " . . . if Congress meant to bar claims based on the intentional torts of government employees acting within the scope of their duties, it could not possibly have intended that the government be responsible for intentional torts committed by employees who were acting outside the scope of their duties and were therefore even less subject to the government's supervision and control" (footnote omitted), (Petitioner's Writ of Certiorari to the United States Court of Appeals for the Third Circuit, 10).

The Government misinterprets Respondent's cause of action. This action is not based on the commission of

an intentional tort by a government employee. Rather, the action is premised on the failure of Government officials to separate Private Heard from military service once they learned that he was unfit for such service. The Government's argument has been considered by a number of courts and specifically rejected. In *Panella v. United States,* 216 F.2d 622 (2d Cir. 1954), a federal inmate's tort claim for injuries sustained from an assault by another inmate, but allegedly occasioned by the negligence of employees of the government, was held not to be barred by section 2680(h): "For in the present case the only basis of liability against the Government is the negligence of its employees, not their deliberate torts, since the assailant was not a government employee . . . In this case, however, a negligence action is not merely an alternative form of remedy for assault, but negligence is rather the essence of plaintiff's claim." See also, *Liuzzo v. United States,* 508 F.Supp. 1030 (D.C. Mich. 1981) ("In this case the 'essence' of their claims does not change merely because the assault may have been committed by a government employee").

Additionally, imposition of liability on the government in this matter does not create a "novel form of liability" (Petitioner's Writ of Certiorari to the United States Court of Appeals, 10). Under Restatement of Torts Second, 448 (1965), page 480:

> "The act of a third person in committing an intentional tort or crime is a superseding cause of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime, unless the actor at the time of his negligent conduct realized or should have real-

ized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime."

A cause of action premised on this provision is hardly novel. *Hicks v. United States,* supra; *Underwood v. United States,* supra, and *Fair v. United States.*

2. The Court of Appeals did not err in holding that the *Feres* doctrine does not bar Respondent's claim. First, the Government unduly focuses on the status and activity of the negligent parties, military personnel, without considering the status and activity of the injured party, Plaintiff's decedent, Vernon Shearer. *Feres* insulates the military from FTCA suits arising out of "negligent orders given or negligent acts committed in the course of" an injured serviceman's military duty. *Stencel Aero Engineering Corp. v. United States,* 431 U.S. at 671; *United States v. Brown,* 348 U.S. 110, 112 (1954); *Feres v. United States,* 340 U.S. at 146; *Jaffe v. United States,* 663 F.2d at 1233.

These terms "in the course of" and "incident to", however, are not self-evident truths that leap out to illuminate any factual situation. Consequently, courts must probe beneath these conclusionary statements and must identify more specific facts to determine whether an injury or death was sustained in the "course of" or "incident to" one's military service. Application of the doctrine focuses on the relationship between the serviceman and the military at the time and place the injury was sustained. The status and activity of the injured serviceman often seem to be the controlling factors. The important distinguishing factors to be accounted for are: the status of the injured soldier at the time of injury, the place of the injury,

the nature of the activity engaged in, and whether the injured party was acting under orders or compulsion. These factors control *Feres* doctrine cases. *United States v. Brown,* 348 U.S. at 112; *Feres v. United States,* 340 U.S. at 146; *Jaffe v. United States,* 663 F.2d at 1232. See also, *Parker v. United States,* 611 F.2d 1007, 1013-15, (5th Cir. 1980), *Woodside v. United States,* 606 F.2d 134, 138-42 (6th Cir. 1979), cert denied, 445 U.S. 904 (1980); *Harten v. Coons,* 502 F.2d 1363, 1365 (10th Cir. 1974), cert denied, 420 U.S. 977 (1975). Merely focusing on the status and activity of the allegedly negligent parties is both inappropriate and not in accord with the case law interpreting *Feres.*

The Court of Appeals appropriately concluded: "Although receiving medical treatment in military hospitals may be considered an activity and benefit incident to military service and therefore barred under *Feres,* certainly being kidnapped off base at gun point can never be perceived as one of the activities or anticipated free benefits of being in the armed services. Thus, there is no legitimate basis on which *Feres* can bar appellant's claim."

Moreover, maintenance of the instant cause of action is not an attempt to "second-guess" military decisions. Such an argument may have merit when decisions are called into question concerning the appropriateness and conduct of wartime conditions. See *Jaffe v. United States,* supra.

Respondent attacks not the formulation standards to judge the fitness of applicants to the military forces of this country, nor the standards governing the retention of service members in the military, but the specific failure to remove Heard from active duty using existing pro-

cedural remedies available to it during the almost three years that Heard served in prison for bludgeoning a German woman to death while on active duty in that country, or during the better than four months following Heard's release from prison when he was continued as a member of the active Army before taking Shearer's life. In *Gibson v. United States,* supra, the Court of Appeals for the Third Circuit explained clearly that "'application of . . . policy to the individual case is an administrative decision at the operational level which, if negligently done, will make the Government liable . . .", quoting *White v. United States,* 317 F.2d 13, 17 (4th Cir. 1963).

Finally, permitting Respondent's suit will have no effect on military discipline. This is so since the murder of Shearer occurred off the military base while the actors were not involved in service-connected activity. A suit by one on leave from a military base to attend to his personal affairs, while under no military supervision, will not interfere with military discipline. *Parker v. United States,* supra. *Harten v. Coons,* 502 F.2d 1363 (10th Cir. 1974). The question which must be asked is: Was plaintiff's decedent performing duties such as to undermine traditional concepts of military discipline if he were permitted to maintain a civil suit for injuries resulting therefrom? The answer is clearly no.

CONCLUSION

The Petition for a writ of certiorari should be denied.

Respectfully submitted,

WILLIAM T. CANNON

Attorney for Respondent